FOR ARGUMENT

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No. 95-809

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,

v.

PAUL L. SPINK,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF ENGINEERS AND SCIENTISTS GUILD, LOCKHEED SECTION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The Engineers and Scientists Guild, Lockheed Section ("the Guild") is a labor organization which represents over 700 engineers and other professional and technical employees of Lockheed Corporation ("Lockheed" or "the Employer"), with whom it has had a collective bargaining relationship for over fifty years. Its present and former members are participants in the single-employer pension plan maintained by Lockheed.

The Guild supports the Respondent on the first question presented, namely, whether a plan may lawfully condition enhanced pension benefits on participants' signing of a release of the plan sponsor's corporate liabilities. As the exclusive bargaining representative for these employees, the Guild is particularly well-suited to address employees' concerns with employer misuse of plan assets. The Guild has, in the past, commenced litigation challenging Lockheed's requirement that employees sign a broad release of any employment claims they might have against Lockheed as a condition of receiving enhanced pension benefits.

SUMMARY OF ARGUMENT

Companies that sponsor pension plans for their employees often treat the funds that have been set aside to pay for those benefits as "their" money, to be used for corporate purposes rather than for the sole and exclusive benefit of plan participants. That is plainly illegal under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq*. While companies may create, amend and terminate pension plans in their own best interests, the assets held in trust by an ongoing pension plan can never be used by or for the benefit of the sponsoring employer. Sections 406(a)(1)(D), 406(b)(1), 29 U.S.C. §§ 1106(a)(1)(D), 1106(b)(1).

More particularly, employers may not use pension plan assets to obtain releases of corporate liabilities from employees by requiring such releases as a condition of receiving benefits. Such releases provide no benefit whatsoever to plan participants; on the contrary, the only party that receives any benefit from such releases is the employer. Such use of plan assets for the benefit of a

sponsoring employer is a "prohibited transaction" under Section 406 of ERISA, 29 U.S.C. § 1106, not to mention a violation of the plan's trustees' fiduciary duty to use plan assets for the exclusive benefit of participants and beneficiaries under Section 404(a)(1)(A) of ERISA, 29 U.S.C. §§ 1104(a)(1)(A).1/ While an employer is free to use its own funds to obtain these releases, ERISA does not permit it to purchase them with plan assets.

Lockheed and the *amici* supporting it claim, however, that it has the right to use plan assets to purchase releases from its employees because it was not acting as a fiduciary when it amended the Plan. Therefore, so the argument goes, Lockheed can direct the trustees to use these funds—which they hold in trust for plan participants—for its, not the participants', benefit, even though it would be a prohibited transaction for the trustees to do this on their own initiative.

1/ This issue may not be before the Court, since Lockheed has not asked this Court to review whether the plan's trustees violated their fiduciary duties by requiring a release of Lockheed's corporate liabilities as a condition of benefits. This brief raises this issue in order to address the issues raised by Lockheed in a more comprehensive manner.

Merely restating Lockheed's argument shows why it must be rejected. Use of plan assets for the benefit of sponsoring employers is a *per se* violation of the trustees' fiduciary duties. It is irrelevant, as far as ERISA is concerned, whether the trustees used these assets for Lockheed's benefit on their own initiative or because Lockheed's amendment to the Plan required it. The plan fiduciaries' duty to administer the plan solely for the benefit of participants and fiduciaries under Section 404(a)(1)(A) prohibits this use of plan assets.

Lockheed and *amici* also claim that the Ninth Circuit's decision would effectively outlaw early retirement programs and would interfere with employers' ability to provide enhanced pension benefits, either unilaterally or through collective bargaining. These exaggerated claims simply fall apart on closer inspection.

The Ninth Circuit's decision was correct. It should be affirmed for all the reasons set forth below.

ARGUMENT

A. LOCKHEED'S USE OF PLAN ASSETS TO PURCHASE RELEASES WAS A PROHIBITED TRANSACTION.

The plan's trustees have breached their fiduciary duty to administer the plan solely for the benefit of participants and beneficiaries under Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A), and engaged in a prohibited transaction in violation of Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) by requiring employees to execute a release of claims against Lockheed as a condition of receiving early retirement benefits. Section 406 provides, in pertinent part:

> Except as provided in Section 1108 . . . [a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. . . .

As the employer who has sponsored this pension plan, Lockheed is a "party in interest" within the meaning of Section 3(14)(C) of ERISA, 29 U.S.C. § 1002(14)(C). By using plan assets to purchase these releases, the trustees permitted the use of plan assets "by or for the benefit of" Lockheed. That is a *per se* violation of ERISA.

Lockheed and *amici* argue, however, (1) that the trustees whom Lockheed appointed were not acting as fiduciaries in requiring these releases as a condition of early retirement benefits, since they were merely following the terms of the plan, rather than exercising their own discretion, and (2) that the use of plan assets for Lockheed's benefit is therefore not a prohibited transaction. That argument is illogical and wrong.

When Congress prohibited transactions in which plan assets were used by or for the benefit of sponsoring employers, it did not draw a distinction between those transactions which the trustees initiated and those provided for by the plan documents themselves. While the common law required proof that the third party's relationship with

the fiduciary might influence the best judgment of the fiduciary, Congress instead imposed an absolute rule that defines by statute those persons ("parties in interest") who are deemed to have such an influence. Congress made all such transactions a *per se* violation of ERISA, without regard for either the trustees' state of mind or their reasons for engaging in this sort of transaction.[2/] Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1213 (2d Cir. 1987); Donovan v. Cunningham, 716 F.2d 1455, 1464-1465 (5th Cir. 1983); M & R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982). Lockheed's distinction between trustee-initiated prohibited transactions and prohibited transactions required by the plan documents has no statutory basis.

2/ An example shows why it is irrelevant whether the transaction was initiated by the trustees or by the party in interest itself. Assume a corporate sponsor passed a plan amendment requiring the plan to lend it money. The trustees' implementation of such amendments would be a violation of Section 406(a)(1)(B) of ERISA, 29 U.S.C. § 1106(a)(1)(B), regardless whether they initiated or merely implemented the deal. M & R Investment Co., Inc. v. Fitzsimmons, 685 F.2d 283, 287 (9th Cir. 1982).

Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D) states this explicitly:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . .
>
> (D) in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.*

(emphasis added) Congress could not have stated this any more directly: trustees' fiduciary duties and the specific prohibitions imposed by ERISA prevail over any contrary requirements created by the plan documents. Lockheed's argument that the trustees were free to engage in prohibited transactions because the plan required it is completely untenable.

What is more, Congress expressly rejected the notion that trustees can defend their participation in prohibited transactions on the ground that they were merely following

the instructions of the sponsoring employer. Section 510(a) of ERISA, 29 U.S.C. § 1110(a), provides that any agreement purporting to relieve a fiduciary from responsibility or liability with respect to any duty or obligation under Part I of ERISA is void as against public policy.

In voiding such agreements, Congress rejected the common law doctrine that permitted settlors to excuse trustees' breaches of their fiduciary duties. Donovan v. Mazzola, 716 F.2d 1226, 1239 (9th Cir. 1983). As the House Education and Labor Committee noted, employee benefit funds are very different from traditional trusts and require different restrictions on both trustees and sponsoring employers:

> [R]eliance on conventional trust law is often insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of

persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.

H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), reprinted in [1974] U.S. Code Cong. & Admin. News 4639, 4650.

If sponsoring employers cannot excuse trustees' breach of their fiduciary duties, then *a fortiori* they cannot direct them to breach those duties. Lockheed's claim that a prohibited transaction somehow stopped being prohibited because the plan documents required it is completely wrong as a matter of law.

This Court, moreover, rejected any distinction between breaches initiated by plan trustees and those called for by plan documents in United Mine Workers of America Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982), the one case in which this Court might have been expected to recognize such a distinction, if one existed. On the contrary, the Court made it clear that, while trustees were expected to follow the terms of plan documents, that did not give them the power to take actions that ERISA plainly prohibited. As the Court noted:

> *Absent conflict with federal law*, then, the trustees breached no fiduciary duties in

> administering the 1950 Benefit trust in accordance with the terms established in the 1974 collective-bargaining agreement. . . . *The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA.* (emphasis added)

Id. at 574, 575. The amendment's authorization of use of plan assets to purchase releases of Lockheed's corporate liabilities is just such a conflict.

Lockheed had no right to require the trustees to use plan assets for its benefit. The trustees had no power to do so. Lockheed's argument that the trustees did not breach their fiduciary duties by participating in a prohibited transaction simply because it was required by plan documents is plainly wrong and should be rejected.

B. LOCKHEED IS THE ONLY PARTY TO BENEFIT FROM THESE RELEASES.

Lockheed does not deny that it is a party in interest within the meaning of Section 3(14)(C). Lockheed and its *amici* claim, however, that it did not draw any more than an incidental benefit from this plan amendment and that the real beneficiaries were the plan participants, who received enhanced pension benefits as a result. This argument is pure sophistry.

The issue in this case is not whether Lockheed has the right to provide enhanced benefits for plan participants out of plan assets, as Lockheed sometimes appears to claim. (Brief at 18-19) No one disputes that Lockheed has that right and no one has tried to stop it from exercising it.

On the contrary, the issue that is actually in dispute in this case is whether Lockheed can condition receipt of those benefits on the giving of a release—a condition that provides absolutely no benefit whatsoever to the plan, the participants or their beneficiaries, but which does convey a substantial benefit to Lockheed at participants' expense.

That condition confers a direct, rather than incidental, benefit to Lockheed.

Lockheed and *amici* insist, on the other hand, that this use of plan assets to purchase releases is not only lawful, but part of the ordinary give-and-take of labor relations, in which employers adjust their compensation packages by offering improved benefits in one area while reducing them in others. According to Lockheed, the Ninth Circuit's decision would prevent employers from ever negotiating a contract that provided both enhanced pension benefits and lower wages, since they could be charged with using plan assets to buy the union's agreement to the wage reduction. (Brief at 27)

Lockheed's exaggerated fears are completely baseless. First, the Court of Appeals does not suggest anywhere in its decision that an employer would engage in a prohibited transaction by reducing wages while increasing benefits. On the contrary, its decision is carefully limited to the particular facts before it; when the Court did resort to a hypothetical example to illustrate its point, the facts it chose

(buying releases with a check drawn on plan funds) do not bear even a faint resemblance to the extreme position that Lockheed claims it is taking. Lockheed has chosen to attack a straw man of its own creation.

Further, the Ninth Circuit's decision simply cannot be stretched, no matter how hard Lockheed tries, to reach this extreme result. The example that Lockheed uses in its argument serves to illustrate the point.

Lockheed claims that the Ninth Circuit's decision would make it unlawful for an employer to require employees to accept wage cuts as a condition of enhanced pension benefits. But there is a significant difference between the wage cut in Lockheed's hypothetical and the releases that Lockheed demanded in this case. An employer whose employees are not represented by a union can lower employees' wages at will, without any need for employees' consent. A unionized employer can do the same, either by obtaining the union's agreement or by changing employees' wages unilaterally after bargaining to impasse with the union. NLRB v. Katz, 369 U.S. 736 (1962). The employer

does not need employees' agreement to these wage cuts in either case.

Furthermore, if an employer does succeed in winning wage cuts by offering enhanced pension benefits, it does not need to call upon the plan fiduciaries to enforce its bargain. In that case, the plan administrators' only responsibility would be to pay whatever enhanced benefits the employer agreed to; any wage cuts, on the other hand, would be a matter of personnel, not plan, administration and no concern of the trustees. In this case, by contrast, Lockheed can only obtain these releases by directing the plan to withhold these benefits from those who refuse to surrender their rights.

Those rights are, moreover, individual, rather than collective. No employee can waive any other employee's right to sue their employer for sexual harassment or assault or any of the other tort and statutory claims that Lockheed's waiver would have extinguished. Nor can the Union. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974). The only way that Lockheed can obtain these releases is to purchase them from individual employees.

It is, of course, free to do so, so long as it uses its own money to purchase them. It has no right, on the other hand, to use its and the plan's fiduciaries' control over participants' and retirees' benefits as leverage to purchase these releases.

The Ninth Circuit's decision bars employers from using plan assets to acquire rights or benefits that they could only obtain by bargaining directly with individual workers. It does not, on the other hand, bar employers from negotiating with unions to raise benefits, even if they obtain lower wages or other concessions in the bargain. Lockheed's alarmist predictions about the end of early retirement programs or the threat to the institution of collective bargaining only serve to underscore just how weak its substantive arguments are.

C. CONGRESS HAS NOT SANCTIONED USE OF PLAN ASSETS TO PURCHASE RELEASES.

Finally, Lockheed argues that Congress implicitly endorsed use of plan assets to buy employee waivers when

it amended the Age Discrimination in Employment Act ("the ADEA"), 29 U.S.C. § 621 *et seq.* by the Older Workers Benefits Protection Act ("the OWBPA"), 29 U.S.C. § 626. The language of the OWBPA simply will not support this claim.

Section 626(f) establishes a detailed and exacting set of requirements which any employer seeking to obtain a waiver of ADEA claims must meet. That section provides:

> (H) if a waiver is requested in connection with an exit incentive program or other employment termination program offered to a group or class of employees, the employer [must] . . . inform . . . the individual in writing in a manner calculated by the average individual eligible to participate, as to—
>
> (i) any class, unit or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Lockheed argues that this language is an implicit authorization for it to require employees to sacrifice their ADEA and other claims as a condition of receiving benefits under the plan.

That argument simply will not hold water. While Section 626 dictates in great detail the means by which employers may obtain waivers, it says nothing about the content of those waivers, much less the source of the funds which the employer uses to obtain them.

In fact, where Congress has allowed employers to place conditions on employees' receipt of benefits it has done so directly, in language that speaks to the content of those restrictions, not the method by which they are obtained. *See, e.g.*, Section 203(a)(3)(B), 29 U.S.C.

§ 1053(a)(3)(B) (plans may suspend benefits to employees who return to work for employer or in industry). There is nothing in Section 626, by contrast, that even suggests that Congress meant to authorize the sort of conditions that Lockheed imposed in this case. Lockheed's arguments, no doubt unintentionally, only illustrate that much more clearly why the Ninth Circuit's decision should be upheld.

CONCLUSION

For all the reasons set forth above, Amicus Curiae Engineers and Scientists Guild, Lockheed Section urges that the Ninth Circuit's decision be affirmed.

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Respectfully submitted,

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